PUBLIC PROSECUTOR

v.

LEE AH KOW

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOF ABDUL RASHID J
[CRIMINAL APPEAL NO. 23 OF 1981]
1 AUGUST 1982

CUSTOMS AND EXCISE: *Offence of importing prohibited goods from Singapore - Absence of knowledge of second-hand cars - Whether ground for acquittal - Mistake of fact - Onus on respondent to prove no guilty mind.*

This is an appeal by the learned Deputy Public Prosecutor against the acquittal of the respondent without his defence being called by the learned President on a charge under s. 135(1)(a) of the Customs Act 1967. The respondent imported four second-hand cars from Singapore which under the Customs (Prohibition of Imports) Order, 1978 [PU(A) 37/1978] are declared to be prohibited goods.

On 16 March 1978, the respondent drove four second-hand cars from Singapore to Johore Bahru armed with a declaration form purported to have been signed by Alor Star Motors and an approved permit purported to have been granted by the Ministry of Commerce and Industry to the said alleged Alor Star Motors. The prosecution satisfactorily proved that the approved permit was forged and that Alor Star Motors was a non-existent firm. The four motorcars were seized.

Held:

[1] The importation of the second-hand cars from Singapore though prohibited under the relevant customs order would have been lawful had the respondent been authorised to do so under an approved permit. The second-hand cars which were imported, however, remained prohibited goods on proof that the purported approved permit was forged.

[2] To rebut the presumption under s. 135(2) of the Customs Act, the respondent may prefer a defence that due to mistake of fact and not ignorance of the law that he could not possibly have known that the authority upon which he was acting was defective rendering the vehicles, which he imported, prohibited goods.

[3] For the purposes of s. 135, the secondhand cars imported by the respondent remained prohibited to the knowledge of the respondent where it was proved that the authority acted upon by the respondent was defective.

[4] It was an error on the part of the learned President to rule that for an offence under s. 135(1)(a) of the Customs Act, it is incumbent upon the prosecution to prove that the respondent had a guilty mind to import the second-hand cars from Singapore which have been declared to be prohibited goods. The learned President should have ruled that the onus was on the respondent to prove that he had no guilty mind when he so imported the said prohibited goods.

[5] The appeal was allowed and the learned President was directed to call upon the respondent to make his defence.

[Appeal allowed. Defence to be called.]

Cases referred to:
Public Prosecutor v. Koo Cheh Yow & Anor. [1980] 2 MLJ 235
Ng Kim Huat v. Public Prosecutor [1961] MLJ 308
Public Prosecutor v. Yuvaraj [1968] 1 MLJ 238
Wong Chooi v. Public Prosecutor [1967] 2 MLJ 180

Legislation referred to:
Customs Act 1967, ss. 119, 135, (1)(a), (2)

For the appellant - Hashim Yusof (Deputy Public Prosecutor Customs)
For the respondent - Tan Hock Kim

JUDGMENT

Mohd. Yusof Abdul Rashid J:

This is an appeal from the decision of the learned President who acquitted and discharged the respondent without calling for his defence in relation to a charge under s. 135(1)(a) of the Customs Act, 1967. The learned President held that for an offence under s. 135(1)(a) "prosecution must prove that the accused had *mens rea*" and since the prosecution had failed to do so the respondent was acquitted and discharged. In my judgment the learned President had erred in law.

The respondent was charged under s. 135(1)(a) of the Customs Act 1967 for being concerned in importing four second-hand cars from Singapore which, under the Customs (Prohibition of Imports) Order, 1978 [PU(A) 37/1978], are declared to be prohibited goods. On 16 March 1978 the respondent drove motorcar Nos. SV. 4933, SV. 5530R, SX. 5004S and SW. 2698C from Singapore to Johore Bahru armed with a declaration form purported to be signed by Alor Star Motors and approved permit purported to have been granted by the Ministry of Commerce and Industry to the alleged Alor Star Motors. The prosecution satisfactorily proved that the approved permit was forged and that Alor Star Motors was a non-existent firm. The four motorcars were seized.

At the close of the case for the prosecution the learned President was satisfied that

a) the vehicles referred to were prohibited goods;

b) the respondent was concerned in importing the said prohibited goods;

c) the prosecution had proved that the approved permit was forged and so the importation was contrary to the prohibition.

In the circumstances, I am of the view that the learned President should have held that a *prima facie* case had been established and should have called upon the respondent to make his defence.

The interpretation and effect of ss. 135(1)(a) and 135(2) of the Customs Act 1967 have been discussed in detail by the Federal Court in the case of *Public Prosecutor v. Koo Cheh Yow & Anor*. [1980] 2 MLJ 235. The decision of the Federal Court in that case is summarised in the head-note as follows:-

Held, by a majority (Suffian L.P. dissenting):

(1) a denial by the accused of knowledge of the relevant prohibition under s. 135(1)(a) of the Customs Act, 1967, does not entitle him **simpliciter** to an acquittal. Even if he proves to the satisfaction of the Court that he in fact does not know the existence of the prohibition, he is still not entitled to be acquitted unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition;

(2) proof of lack of absence of knowledge, again on a balance of probabilities, that the goods

in question are prohibited from importation (e.g. as in this case that the pianos originated from South Africa) may be ground for an acquittal as a mistake of fact, but a denial of the knowledge of the ban, as a matter of law may not be, even if backed by sufficient proof except in the circumstances set out, that is unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition;

(3) it is sufficient for the prosecution to prove that the goods were of the description mentioned in the prohibition in order to show that the importation was contrary to the prohibition. The burden then shifts to the accused to establish on a balance of probabilities that he did not know of the prohibition and could not have reasonably known of the prohibition;

(4) the exception to the rule against ignorance of law as a defence should not be extended beyond the cases where the accused could not possibly have known of the existence of the law he had offended against.

The said decision is understood to mean that for an offence under s. 135(1)(a) of the Customs Act, once the prosecution has proved that an accused is concerned in the importation of goods, the importation of which is prohibited and that the importation is contrary to the prohibition, then, by virtue of s. 135(2) of the Act, the burden shifts to the accused to establish on a balance of probabilities that he could not have reasonably known of the prohibition. Further, under s. 135(2) of the Act, proof of lack or absence of knowledge that the goods in question are prohibited from importation may be ground for an acquittal as a mistake of fact.

In the instant case, the onus shall be on the respondent to prove that the importation was lawful so as to rebut the presumption under s. 119 of the Customs Act which provides-

If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovery of any penalty or penalties under this Act, any dispute arises whether the custom duties have been paid in respect of any goods, or whether the same have been lawfully imported or exported or lawfully landed or loaded, or concerning the place whence such goods were brought or where such goods were loaded, or whether anything is exempt from duty under s. 14 then and in every such case the burden of proof thereof shall lie on the defendant in such prosecution.

by proving, on a balance of probabilities, that the approved permit was not forged. On the other hand, the respondent may raise a defence that he could not have reasonably known that the approved permit was forged in order to rebut the presumption under s. 135(2) of the Customs Act, 1967.

The importation of the second-hand cars from Singapore though prohibited under the relevant customs order would have been lawful had the respondent been authorised to do so under an approved permit. The second-hand cars which were imported, however, remained prohibited goods on proof that the purported approved permit was forged. To rebut the presumption under s. 135(2) of the Customs Act the respondent may prefer a defence that due to mistake of fact and not ignorance of the law that he could not possibly have known that the authority upon which he was acting was defective rendering the vehicles, which he imported, prohibited goods.

Counsel for the respondent contends that s. 135(2) of the Customs Act does not apply in the circumstances of the case. The provisions of s. 135(2) are as follows-

(2) In any prosecution under this section or s. 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods as the case may be to the knowledge of the defendant unless the contrary is proved by such defendant.

I cannot accede to the contention of the learned counsel for the respondent. *a*

It is pertinent to cite here the observation of Thomson, CJ (as he then was) in the case of *Ng Kim Huat v. Public Prosecutor* [1961] MLJ 308 where His Lordship explained the words "dutiable goods" since by analogy the observation may equally by applicable to explain the words "prohibited goods". In that case, Thomson CJ said -

> By s. 2 "dutiable goods" are "goods subject to the payment of customs duty and on which such duty has not yet been paid." By s. 10 customs duties may be levied on goods "imported into or exported from the Federation." It is thus clear that the same goods may at different stages of their existence be `dutiable goods' and goods which are not 'dutiable goods'. I buy a bottle of whiskey in England. At that stage it is not 'dutiable goods' within the meaning of the Ordinance. I then import it (I am coming to the meaning of import) into the Federation and it becomes 'dutiable goods'. I then pay duty open it and it ceases to be 'dutiable goods'. It is only 'dutiable goods' between the moment when it is first imported and the moment on which duty is paid. In other words, before goods on which customs duties have been levied can be described as 'dutiable goods' for the purposes of the Ordinance they must comply with both of two conditions. One is that they must have been imported, and the other is that duty must not yet have been paid on them.

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Applying the said observation to "prohibited goods", it is true that, in the instant case, when the respondent bought the second-hand cars in Singapore, they were not "prohibited goods". As the said second-hand cars were driven to the Johore Bahru customs check-point, they became "prohibited goods" so, in importing them, the importation of the said second-hand cars were prohibited under the relevant customs order. However, such importation would not be prohibited had the approved permit under which the said second-hand cars were imported been valid.

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It is then clear that whether or not the importation of the second-hand cars from Singapore is prohibited depends entirely on the validity of the approved permit. Where the approved permit is valid then the importation of the second-hand cars would have been authorised and ceased to be prohibited under the Act. However, the said second-hand cars remain prohibited goods should the approved permit be proved to be invalid. Hence, for the purposes of s. 135, the second-hand cars imported by the respondent remained prohibited to the knowledge of the respondent where it is proved that the authority acted upon by the respondent was defective.

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Be it noted that from the evidence of the prosecution witnesses it was disclosed that by merely looking at the alleged approved permit, even the customs officers were unable to determine that the said approved permit was forged. It was also disclosed that the approved permit was endorsed by a superintendent of customs, En. Sabri bin Abdul Hamid, to the effect that the said approved permit had been compared with the duplicate copy which was in the custody of the customs. In order to rebut the presumption under s. 135(2) of the Customs Act the respondent may rely on the said evidence in support of his defence.

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The Federal Court in the case of *Public Prosecutor v. Yuvaraj* [1968] 1 MLJ 238 held that the burden of rebutting the presumption may be discharged on a balance of probabilities and the said decision was upheld by the Privy Council. In the course of giving his opinion Ong Hock Thye FJ. (as he then was) in delivering the judgment of the Federal Court cited with approval the judgment of Azmi, C.J. (as he then was) in the case of *Wong Chooi v. Public Prosecutor* [1967] 2 MLJ 180 where His Lordship Justice Azmi pronounced -

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> In my view the law is quite clear, that where a burden is placed on an accused person to prove anything, by statute or common law, that burden is only a slight one and that this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence of the defence.

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In the circumstances, in determining whether or not the defence has successfully rebutted the presumption, on the balance of probabilities, the Court, besides the evidence of the defence witnesses, may take into account the evidence of the witnesses for the prosecution.

In the Federal Court case of *Public Prosecutor v. Koo Cheh Yew & Anor.*, cited earlier, the Federal Court was reluctant to consider whether or not s. 135(1)(a) of the Customs Act has created a strict liability offence. The opinion of the Federal Court in this respect is stated at p. 239 of the said case as follows-

> But for ourselves we do not consider, in the context of s. 135 in its entirety that there is any real materiality in the question whether *mens rea* is or is not an essential element in an offence under s. 135(1)(a) thereof. If the proper construction be that it is not, it becomes a matter of strict liability and *Frailey v. Charlton* would have no relevance. On any other view, then having regard to the fact that the prohibition is one 'for the regulation for the public welfare of a particular activity', s. 135(2), *supra* which is absent in the English Act and which therefore distinguishes *Frailey v. Charlton*, supplies the answer. By its deeming provisions, this subsection relieves the prosecution of the necessity to prove the knowledge of the appellants. It becomes a fact, proved as a matter of law, that the goods, in this instance, were prohibited goods: see the well-known definition of 'deemed to be' by Cave J. in *R. v. Norfolk County Council*. And in such a case, the doing of the act forbidden by statute supplies *mens rea* and ignorance of the law is no defence: *Labour Department v. Green; J.M. Allan v. Cloke.*

On the ground above stated it was an error on the part of the learned President to rule that for an offence under s. 135(1)(a) of the Customs Act it is incumbent upon the prosecution to prove that the respondent had a guilty mind to import the second-hand cars from Singapore which have been declared to be prohibited goods and that the learned President should have ruled that the onus is on the respondent to prove that he had no guilty mind when he so imported the said prohibited goods.

This appeal is allowed and the learned President is hereby directed to call upon the respondent to make his defence. It is for the respondent to prove either that the approved permit was not forged or that he could not have reasonably known that the approved permit was forged.

Also found at [1982] CLJ 561